have been applied by one systematic forward movement without the plaintiff's solicitors having filed the summons to backtrack to the registry a second time to obtain the sealed summons then having served the sealed summons return to the registry a third time to file an affidavit of service of the sealed summons.

Some reservation was expressed as to the propriety of serving an unsealed copy of a summons on the defendant. Rule 16 as read with r. 1 of O. 32 does not require that a sealed summons be served. Seeing that the essence to the making of an order under r. 16 is consent without which there can be no order, I do not see any requirement for a sealed summons to be served. Certainly service of such a summons is not envisaged by the Practice Direction abovestated.

I would now make the order under r. 16.

MARIAM BINTI SHAIK MOHD OMAR

v.

ONG CHIN POH

HIGH COURT MALAYA, PENANG
DATO' ABDUL HAMID BIN HAJI MOHAMED J.
[CIVIL APPEAL NO. 11-73-91]
27 JULY 1994

PRACTICE & PROCEDURE: Application to strike out claim - Defence of limitation - Whether claim could be struck out on the basis that the defendant had a good limitation defence - Whether defence of limitation sufficiently pleaded - Subordinate Courts Rules 1980 O. 14 r. 21 - Rules of the High Court 1980 O. 18 r. 19.

The plaintiff commenced action against the defendant in 1987 claiming for damages which the plaintiff alleged the defendant had caused her by causing damage to her property and dwelling house when the defendant undertook the construction of a three storey house in the neighbouring property. The plaintiff further claimed for damages for inconvenience and mental anguish but did not plead nuisance. Apparently the construction work in question had been completed by the defendant in 1977 and hence the defendant, by paragraph 9 of his defence, claimed that the action was barred by statute. The defendant did not however mention the Limitation Act by name.

In August 1988 the defendant filed a notice of application to strike out the plaintiff's summons and statement of claim under O. 14 r. 21 of the Subordinate Courts Rules 1980. The Sessions Judge allowed the application on the ground that the action was statute-barred. The plaintiff appealed and the main issue that arose was whether in applying to strike out the plaintiff's claim herein, it was open for the defendant to rely on the defence of limitation pleaded in the main defence to the claim.

Held:

[1] As to whether a defendant could apply to strike out a claim under O. 14 r. 21 SCR (in *pari materia* with O. 18 r. 19 RHC) on the basis of a good limitation defence, this Court is bound to follow the Federal Court decisions in *Tio Chee Hing & Ors. v. Government of Sabah* and *Haji Husin bin Haji Ali & Ors. v. Datuk Haji Mohamed bin Yaacob & Ors.* Although these two decisions were decisions in respect of the Public Authorities

Protection Act 1948 and not the Limitation Act 1953, the principle applicable nonetheless is the same. In the event this Court will take the view that the defendant herein may rely on the defence of limitation in his application to strike out the plaintiff's claim.

[2] In order to rely on the defence of limitation, the Limitation Act need not be mentioned by name. It is sufficient for the defendant to say, as he did here, that the claim is time-barred by limitation or statute-barred.

[3] The contention that the cause of action in this case, being for nuisance, is a continuous one and therefore unaffected by limitation, cannot be sustained. Nowhere in the statement of claim did the plaintif make any mention of nuisance or any injury to her. The plaintiff's claim rather speaks of damages to her property when the construction work was being carried out by the defendant. The plaintiff's cause of action, under the circumstances, is clearly statute-barred.

[Appeal dismissed].

Cases referred to:
Yeo Chu Hui v. Lim Cheng Jin (f) & Anor. [1993] 1 AMR 18 ***(not foll)***
Tengku Ali Ibni Almarhum Sultan Ismail v. Kerajaan Negeri Terengganu Darul Iman [1994] 2 MLJ 83 ***(not foll)***
Tio Chee Hing & Ors. v. The Government of Sabah [1981] 1 MLJ 207 ***(foll)***
Haji Hussin bin Haji Ali & Ors. v. Datuk Haji Mohamed bin Yaacob & Ors. [1983] 2 MLJ 227 ***(foll)***
Re Estate of Choong Lye Hin, Decd.; Choong Gim Guan v. Choong Gim Seong [1977] 1 MLJ 96 ***(foll)***

Legislation referred to:
Limitation Act 1953
Public Authorities Protection Act 1948
Rules of the High Court 1980, O. 18 r. 19
Subordinate Courts Rules 1980, O. 14 r. 21

For the appellant / plaintiff - Karpal Singh; M/s. Karpal Singh & Co.
For the respondent / defendant - Eric Tan Kim Hong; M/s. Johari Ahmad & Tan

JUDGMENT

Abdul Hamid Bin Haji Mohamed J:
The plaintiff commenced this action on 13 May 1987 as the registered proprietor of premises and land known as 124 Malacca Street, Penang. The defendant is the owner of the neighbouring land and premises known as 126, 126A, 126B along the same road, which the defendant bought in 1976. After purchasing the said land, the defendant demolished the existing one-storey building and constructed a three-storey dwelling house in its place. The plaintiff alleged that as a direct result of the defendant's building construction work the plaintiff's plot of land and dwelling house sustained serious damage and had continued to deteriorate.

Paragraph 6 of the statement of claim says:

> 6. Despite the protests and damage caused to the plaintiff's neighbouring property as stated the defendant continued with the construction work until 1979 when the said construction work was concluded.

The plaintiff claims for:

(a) damages for inconvenience and mental anguish;
(b) special damages at RM17,040;
(c) interest;
(d) costs;
(e) further and other reliefs.

The defendant in his defence, denies that his construction work had caused damage to the plaintiff's property. In paragraph 9 of the defence, the defendant says.

> 9. The defendant pleads that the plaintiff's claim is statute-barred.

On 25 August 1988 the defendant filed a notice of application to strike out the summons and the statement of claim under O. 14 r. 21 of the Subordinate Courts Rules 1980 (SCR 1980) which is in *pari materia* with O. 18 r. 19 of the Rules of the High Court 1980 (RHC 1980).

The learned Judge of the Sessions Court allowed the defendant's application, on the ground that the cause of action was statute-barred.

The learned Sessions Court Judge made a finding of fact which was not disputed in the appeal before me and which I accept. That is, that the construction work was completed in July 1977. However this finding of fact is not really material as, even if we were to take the completion date as 1979 as alleged by the plaintiff, still the action was commenced more than six years later.

Before me, Mr. Karpal Singh, learned Counsel for the plaintiff raised two issues. The first is whether the action is statute-barred. The second, which is actually connected with the first issue, is whether nuisance was pleaded.

After hearing the arguments on both sides, I reserved my decision for two days. During that period, learned Counsel for the plaintiff submitted some authorities as well as raising a new point that there was delay on the part of the defendant in making the application under O. 14 r. 21 SCR 1980.

Mr. Karpal Singh drew my attention to two decisions of the High Court in which the learned Judges held that a defendant could not apply to strike out a claim under O. 18 r. 19 of the RHC 1980 on the basis of a good limitation defence. The two authorities are: *Yeo Chu Hui v. Lim Cheng Jin (f) & Anor.* [Abdul Malek bin Haji Ahmad J.] [1993] 1 AMR 18 and *Tengku Ali Ibni Almarhum Sultan Ismail v. Kerajaan Negeri Terengganu Darul Iman* [Idris Yusoff J.] [1994] 2 MLJ 83. The judgment in the last-mentioned case was confirmed by the Supreme Court very recently, but we have not had the advantage of the written judgment yet.

On the other hand I found two decisions of the Federal Court which say otherwise. The first case is *Tio Chee Hing & Ors. v. Government of Sabah* [1981] 1 MLJ 207. In that case the defendant did not enter appearance or file a defence but applied to strike out the statement of claim on the ground, *inter alia*, that the claim was statute-barred. The learned trial Judge held that the claim was statute-barred and he dismissed the claim. The plaintiff appealed to the Federal Court. The Federal Court dismissed the appeal and, *inter alia*, held:

> (2) In any event, the appellant's claim was clearly statute-barred and not maintainable against a defence that relied on limitation.

The other case is *Haji Hussin bin Haji Ali & Ors. v. Datuk Haji Mohamed bin Yaacob & Ors.* [1983] 2 MLJ 227. In this case the appellants (plaintiffs) filed suits against the Menteri Besar, the State Secretary and the Government of Kelantan alleging that their dismissal as penghulus was unconstitutional and unlawful. The respondents (defendants) did not file a defence but applied for the writ to be struck out under O. 18 r. 19 of the RHC 1980. It was averred that the actions were filed too late as they were statute-barred by the Public Authorities Protection Act 1948.

Mohamed Eusoff Chin J. (as he then was) struck out the writs and the appellants/plaintiffs appealed. The Federal Court dismissed the appeals and, *inter alia*, held:

> (1) where it was clear that the defendants were going to rely on limitation and there was nothing before the Court to suggest that the plaintiffs could escape from it, the claim would be struck out.

I am aware that in the two Federal Court decisions the relevant statutes are the Public Authorities Protection Act 1948, not the Limitation Act 1953 as in this case. However, I am of the view that the principle applicable is the same.

So, there are two lines of authorities before me. With greatest respect to the two learned Judges who decided *Yeo Chu Hui's* case and *Tengku Ali's* case, I think I am bound to follow the two Federal Court decisions because, firstly, they are decisions of the Federal Court and are binding on me. Secondly, it is unfortunate that the two decisions of the Federal Court were not referred to the learned Judges when the two other cases were argued before them.

In conclusion I take the view that the defendant may rely on the defence of limitation in his application to strike out the plaintiff's claim.

The next point is whether limitation was sufficiently pleaded in the defence. Learned Counsel for the plaintiff submitted that the Act must be mentioned by name. He relied on the wording of s. 4 of the Act itself, stressing on the words "unless this Act has been expressly pleaded.". In this regard I am grateful to Mr. Eric Tan, Counsel for the defendant for showing me the decision of the Federal Court in *Re Estate of Choong Lye Hin, Decd., Choong Gim Guan v. Choong Gim Seong* [1977] 1 MLJ 96. That case clearly says that the Ordinance (now Act) need not be mentioned by name but it would be sufficient for the defendant to say that the claim is time-barred by limitation or statute-barred. I think that that case gives a complete answer on this point.

The next question is whether the cause of action is a continuous one because if it is so then limitation would not set in. Mr. Karpal Singh argued that the cause of action was for nuisance and therefore it did not cease upon the completion of the construction work.

I have reproduced paragraph 6 of the statement of claim. It talks about damage caused to the

plaintiff's property "until 1979 when the said construction work was concluded.". However in prayer (a) the plaintiff claimed for damages, for inconvenience and mental anguish. But nowhere in the statement of claim did the plaintiff make any mention of nuisance or any injury to the plaintiff. The plaintiff's claim only speaks of damages to her property when the construction work was being carried out by the defendant.

It is clear to me that the plaintiff did not plead nuisance. I agree with the finding of the learned Sessions Court Judge on this point. I agree that the plaintiff's cause of action is statute-barred.

There is another issue, namely, *locus standi*. This was not pleaded by the defendant. However, in his affidavit in support of the notice of application, the defendant averred that the plaintiff had no *locus standi* because as on the day the action was commenced, the plaintiff was not the registered owner of the land known as No. 124 Malacca Street, Penang. The notes of evidence before the learned Sessions Court Judge shows that this point was taken up by the learned Counsel for the defendant. However, the learned Sessions Court Judge did not touch on it in her grounds of judgment. As a result even Mr. Karpal Singh did not include that point as one of his grounds in the memorandum of appeal.

In the circumstances, and in view of my finding on grounds discussed earlier, I do not think that it is necessary to decide on that issue.

Lastly, in his letter to me delivered one day after the appeal was heard, and one day before I delivered my decision, learned Counsel for the appellant raised another point, that is, delay on the part of the defendant in making the application in question.

This point was never raised at any time earlier. In fairness to the defendant I do not think I should entertain it.

PETMAL OIL (MALAYSIA) SDN. BHD.

v.

CHE MARIAH BTE MOHD TAHIR (TRADING AS DELTA MEC ENTERPRISE)

HIGH COURT MALAYA, KUALA LUMPUR
DATO' SITI NORMA BTE YAAKOB J.
[CIVIL SUIT NO. D2-22-702-92]
24 MAY 1993

PRACTICE & PROCEDURE: Application to set aside ex parte interim injunction - Defendant contending non-disclosure of material facts - Whether justified - Whether damages in order.

LAND LAW: Application for vacant possession - Defendant 3/5 owner of two sub-divided lots - Defendant occupying petrol station and office on one lot pursuant to dealership agreement - Defendant authorised dealer of plaintiff's petroleum products - Defendant breaching terms of agreement - Plaintiff sending notice to vacate - Defendant's licence to operate petrol station cancelled by authorities - Defendant refusing to deliver vacant possesssion and continuing to operate petrol station - Plaintiff obtaining ex parte interim injunction to oust defendant and agents from petrol station - Whether defendant had right to remain on lot - Whether defendant had right to operate petrol station - Plaintiff alleging oral agreement for cross transfer of shares between parties - Denial by defendant - Whether plaintiff able to prove.

TRUST: Executive chairman of plaintiff claiming to hold 2/5 share of two sub-divided lots as trustee for plaintiff - Lots Malay reservation - Whether any evidence of creation of trust - Whether contrary to law - Sections 2 & 14 of the Malay Reservations Enactment 1938.

WORDS & PHRASES: Malay Reservatons Enactment 1938 - "Malay".

The defendant and the executive chairman of the plaintiff were the registered owners of two sub-divided lots known as HS(M) 5339 PT 8540 and 8541 holding 3/5 share and 2/5 share in both lots respectively. The plaintiff constructed a petrol station on lot 8541 and pursuant to a dealership agreement dated 23 August 1988 the defendant operated the petrol station and sold exclusively petroleum products distributed by the plaintiff until March 1992 when the plaintiff discovered the defendant was selling products distributed by other petroleum companies